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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

16 ALISU INVESTMENTS, LTD. and
17 KARGO GROUP GP, LLC,

18 | Plaintiffs,

19 | V.

20 TRIMAS CORPORATION d/b/a/ NI
INDUSTRIES, INC., BRADFORD
WHITE CORPORATION, LUPPE
21 RIDGWAY LUPPEN, PAULA BUSCH
LUPPEN, METAL PRODUCTS
22 ENGINEERING, DEUTSCH/SDL,
LTD., RHEEM MANUFACTURING
23 COMPANY, and INFINITY
HOLDINGS, LLC,

25 | Defendants.

Case No. 2:16-CV-00686 MWF (PJWx)

Honorable Michael W. Fitzgerald

**PLAINTIFFS' NOTICE OF
MOTION AND MOTION TO
MODIFY PRE-TRIAL
SCHEDULING ORDER**

Date: May 6, 2019

Date: May 6, 2011
Time: 10:00 AM

Judge: Hon. Michael W. Fitzgerald

Jury Trial: February 4, 2020

²⁶ || AND ALL COUNTERCLAIMS

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 **PLEASE TAKE NOTICE** that on May 6, 2019, at 10:00 a.m. at 350 W. 1st
3 Street, in Courtroom 5A, of the United States District Court for the Central District
4 of California, before the Honorable Michael W. Fitzgerald, Plaintiffs and
5 Counterdefendants Alisu Investments, Ltd., and Kargo Group GP, LLC, will move
6 and hereby move to modify and amend the Court's Order re Jury Trial (Doc. 233,
7 Jan. 4 2019), to continue the date of trial from February 4, 2020 to November 3,
8 2020, and adjust pre-trial dates accordingly.

9 This motion is made following the conference of counsel for all parties
10 pursuant to Local Rule 7-3, which occurred between March 15, 2019 and April
11 2, 2019. Plaintiffs' motion is based on Plaintiffs' inability to complete fact and
12 expert discovery within the current pre-trial schedule, due to ongoing regulatory
13 obligations under the California Department of Toxic Substances Control that have
14 prevented and are preventing Plaintiffs from gathering indispensable liability and
15 damages evidence.

16

17 Dated: April 2, 2019

SHER EDLING LLP

18

19 By: /s/ Martin D. Quiñones
20 VICTOR M. SHER
21 MATTHEW K. EDLING
22 MARTIN D. QUINONES
23 TIMOTHY R. SLOANE
24 ADAM M. SHAPIRO

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26

27

28

29 *Attorneys for Plaintiffs ALISU
30 INVESTMENTS, LTD, and
31 KARGO GROUP GP, LLC*

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¹⁶ Fed. R. Civ. P. 16

1 **I. INTRODUCTION**

2 Plaintiffs Alisu Investments, Ltd., and Kargo Group GP, LLC (“Plaintiffs”)
 3 hereby move for a modification of the Court’s Order re Jury Trial (Doc. 233, Jan. 4
 4 2019), continuing the date of trial from February 4, 2020 to November 3, 2020, and
 5 adjusting pre-trial dates accordingly. Plaintiffs’ request is based on their continuing
 6 compliance with regulatory requirements from the California Department of Toxic
 7 Substances Control (“DTSC”), which will yield indispensable damages and liability
 8 evidence upon its completion. Plaintiffs’ investigatory efforts under DTSC
 9 oversight, as memorialized in the Stipulations filed on January 3, 2018 and
 10 December 24, 2018 (Doc. Nos. 131, 227), have taken substantially longer than
 11 anticipated due to the DTSC regulatory process, and cannot be completed before the
 12 current fact and expert discovery cut-off dates.

13 Plaintiffs are the owners of real property located at 4901 S. Boyle Ave. in
 14 Vernon, California (the “Property”), which is subject to a Voluntary Cleanup
 15 Agreement (“VCA”) between Plaintiff Alisu Investments, Ltd., and DTSC.
 16 Plaintiffs have asserted claims against the Defendants under the Comprehensive
 17 Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607
 18 (“CERCLA”), and California law, alleging that the conduct of each Defendant
 19 contributed to contamination detected at the Property, principally from volatile
 20 organic compounds (“VOCs”).

21 As described in greater detail below, Plaintiffs have been actively
 22 investigating subsurface conditions at the Property since 2016 under DTSC
 23 oversight. Despite Plaintiffs’ diligent efforts to complete the investigation and
 24 determine the scope and method of remediation required by DTSC for the Property,
 25 the regulatory process has been repeatedly delayed by features of concern discovered
 26 following the demolition of a building on the Property, and months-long wait times
 27 for DTSC to comment on and approve reports and workplans. As such, Plaintiffs
 28 have been stymied from developing critical liability and damages evidence

1 necessary for adjudication of their claims. The most important remaining steps in
2 the regulatory process are Plaintiffs' submission and DTSC's approval of a Human
3 Health Risk Assessment ("HHRA") and a Feasibility Study ("FS"), which will
4 respectively determine the risk of harm to human health and the environment posed
5 by contamination at the Property, and determine the strategy for completing the
6 assessment and remediating that contamination. Together, approval of both
7 documents by DTSC will provide critical, irreplaceable evidence concerning the
8 degree of harm to Plaintiffs' Property, and the cost Plaintiffs will incur to remediate
9 that harm.

10 Plaintiffs originally estimated that submission and approval of the HHRA and
11 FS would be completed by December 2018, and later estimated that they could be
12 submitted and approved within the first quarter of 2019. However, DTSC did not
13 approve site assessment reports submitted in October 2018 that were necessary for
14 the completion of the Human Health Risk Assessment and Feasibility Study until
15 March 1, 2019. Plaintiffs have therefore been unable to submit the HHRA and FS,
16 despite their diligent efforts. Based on its response times to date, DTSC is unlikely
17 to approve those documents earlier than July or potentially August 2019. Under the
18 current scheduling order, fact discovery closes June 4, 2019, and expert discovery
19 closes on July 23, 2019. It is virtually certain Plaintiffs' submissions will be not be
20 reviewed and approved by those dates. Plaintiffs will be prejudiced in presentation
21 of their claims unless these regulatory steps, which they have worked with all due
22 speed to advance, are completed and their results introduced into evidence.

23 Plaintiffs therefore move this Court to modify the trial and pre-trial dates in
24 this matter according to the timetable in the accompanying Proposed Order.
25 Plaintiffs have met and conferred with counsel for all Defendants concerning the
26 relief requested herein. Defendant Bradford White Corp. does not oppose the
27 motion, and Defendants' Rheem Manufacturing Corp. and Deutsch/SDL Ltd. have
28 not taken a position; Defendants TriMas Corp., Infinity Holdings, LLC, Luppe

1 Ridgeway Luppen, Paula Busch Luppen, and Metal Products Engineering do not
 2 agree to Plaintiffs' requested relief.¹

3 II. PROCEDURAL HISTORY

4 Plaintiffs filed this action against TriMas Corp. on February 1, 2016 (Doc. 1)
 5 and filed First and Second Amended Complaints on March 24, 2016 and April 12,
 6 2016, respectively (Doc. 12 & 16). After initiating document discovery on TriMas,
 7 Plaintiffs filed a Third Amended Complaint on September 13, 2016 (Doc. 37),
 8 adding defendant Bradford White Corp. and another defendant who has since been
 9 voluntarily dismissed. On March 6, 2017, the Court issued an Order re Jury Trial
 10 setting various pre-trial dates, setting trial for August 14, 2018. Doc. 68.

11 On September 13, 2017, pursuant to dates stipulated between Plaintiffs,
 12 TriMas, and Bradford White, Plaintiffs filed a Fourth Amended Complaint, adding
 13 defendants Luppe Ridgway Luppen, Paula Busch Luppen, Metal Products
 14 Engineering (the "Luppen Defendants"); Rheem Manufacturing Company;
 15 Deutsch/SDL, Ltd.; Infinity Holdings, LLC; and an additional defendant who has
 16 since been voluntarily dismissed. Doc. 82.

17 On January 3, 2018, the parties stipulated to modify the Order re Jury Trial, to
 18 permit the new defendants time to "meaningfully participate in discovery" and
 19 obtain a "full and fair opportunity to develop and present their defenses in this
 20 action." Doc. 131 at 2–3. The Order granting the stipulation continued trial and pre-
 21 trial deadlines approximately 12 months, and scheduled trial for August 13, 2019.

22 Plaintiffs represented in the January 3, 2018 stipulation that they had been
 23 diligently investigating the contamination at the Property under DTSC oversight,
 24 including the submission of a Groundwater Monitoring Well/Nested Soil Vapor
 25 Probe Report to DTSC on November 28, 2017, and that Plaintiffs would be "required
 26
 27

28 ¹ Declaration of Martin D. Quiñones at ¶2. All exhibit numbers listed herein refer to
 exhibits to the Declaration of Martin D. Quiñones, submitted herewith.

1 to await comments from DTSC on the Groundwater Monitoring Well/Nested Soil
 2 Vapor Probe Report, then draft and submit a Human Health Risk Assessment and
 3 await comments from DTSC on that Assessment, then draft and submit a Feasibility
 4 Study and Remedial Action Plan.” Doc. 131 at 2. Plaintiffs represented and believed
 5 that work could “not be completed earlier than December 2018, based on Plaintiffs’
 6 reasonable estimates of the time required to produce and submit the required reports
 7 and await comments and guidance from DTSC.” *Id.* Plaintiffs further asserted and
 8 believed “that fact and expert discovery in this action cannot reasonably be
 9 completed until after Plaintiffs’ Human Health Risk Assessment and Feasibility
 10 Study are completed, submitted, and approved by DTSC.” *Id.* at 3.

11 On December 24, 2018, the parties stipulated to stay discovery for 120 days
 12 with certain carve-outs, and modify the trial and pre-trial dates such that non-expert
 13 discovery would cut off June 4, 2019, expert discovery would cut off July 23, 2019,
 14 and trial would commence February 4, 2020. Doc. 227. Plaintiffs represented that
 15 they had been diligently continuing to investigate the contamination at their Property
 16 under DTSC oversight throughout 2018, including the submission of groundwater
 17 monitoring reports, a supplemental site assessment report, and a further site
 18 assessment workplan, each of which are described in more detail below. *Id.* at 1–2.
 19 Plaintiffs agreed to produce newly generated reports and data related to the DTSC
 20 investigation during the stay, which was intended to “provide time for Plaintiffs to
 21 advance their regulatory investigation under the DTSC, and provide time for the
 22 Parties to pursue potential settlement and resolution.” *Id.* at 2. Despite Plaintiffs’
 23 previous best estimate that the regulatory process would be complete by December
 24 2018, at the time of the December 24, 2018 stipulation DTSC had required additional
 25 data collection at the site before it would accept a HHRA and FS, and those
 26 documents had not yet been submitted. *See* Parts III.a–d, *infra*.

27
 28

1 **III. RELEVANT FACTS**

2 During the pendency of this litigation, Plaintiffs' investigation of the
 3 contamination at their Property has been repeatedly hampered and delayed by
 4 months-long turn-around times for comments on and approval of regulatory
 5 submissions to DTSC. As a result, despite Plaintiffs best efforts and best estimates,
 6 Plaintiffs have not yet been able to submit the Human Health Risk Assessment and
 7 Feasibility Study which are vital to an adequate and accurate determination of the
 8 degree of harm to Plaintiffs' Property, Plaintiffs' remediation costs, and allocation
 9 of responsibility among the Defendants.

10 On August 1, 2016, Plaintiff Alisu Investments, Ltd., and DTSC executed a
 11 Voluntary Cleanup Agreement, under which Plaintiffs agreed to investigate and
 12 remediate potential contamination from volatile organic compounds in the
 13 Property's soil, soil gas, and groundwater. Ex. 1, VCA (Aug. 1, 2016).² Under the
 14 VCA, Alisu agreed to perform "all work required" by DTSC, with the express
 15 limitation that "[all] work performed pursuant to this Agreement is subject to
 16 DTSC's review and approval." *Id.* at §§ 6, 15. DTSC had and has the right to
 17 comment on and request modifications to any report, plan, or schedule provided by
 18 Plaintiffs before those documents are approved. *Id.* at § 15. The Agreement
 19 expressly states that "informal advice, guidance, suggestions or comments by DTSC
 20 regarding reports, plans, specifications, schedules or any other writings" cannot take
 21 the place of written approval, which DTSC must provide for any such
 22 submissions. *Id.*

23
 24
 25 ² Certain reports, approval letters, and other regulatory documents related to
 26 Plaintiffs' investigation of the Property are available at DTSC's EnviroStor website,
 27 at the following URL:
 28 https://www.envirostor.dtsc.ca.gov/public/profile_report?global_id=60002375

Where possible, URLs for specific documents are provided in the Declaration of
 Martin D. Quiñones, submitted herewith.

1 Plaintiffs conducted investigatory work both prior to execution of the VCA,
2 and throughout 2016, under DTSC oversight. As relevant to this Motion, Plaintiffs’
3 efforts to diligently sample and characterize contamination at the Property
4 throughout 2017 and 2018 are summarized below.

5 **a. Three Month DTSC Approval Timeline for Foundation Slab
6 Removal and Groundwater Monitoring Well Installation Workplan**

7 On December 16, 2016, Plaintiffs’ environmental consultant Environmental
8 Audit, Inc. (“EAI”) submitted a workplan to DTSC proposing to install three ground
9 water monitoring wells in addition to three wells already present on the Property,
10 remove a large foundation slab on the Property, and conduct sampling and testing of
11 the subsurface soil beneath the foundation slab. DTSC did not provide comments on
12 and approve the workplan until March 10, 2017, and in its approval letter instructed
13 EAI to sample for additional potential contaminants and investigate other potential
14 features of concern. *See Ex. 2* March 10, 2017 Letter from Folashade Simpson to
15 Aliza Karney Guren. On April 6, 2017, DTSC recommended locations for the three
16 new groundwater monitoring wells to be installed on-site. *See Ex. 3*, April 6, 2017
17 Email from Folashade Simpson to Steve Bright. Between June 12 and June 29, 2017,
18 EAI and its subcontractors installed the groundwater monitoring wells pursuant to
19 the workplan. *Ex. 4*, Groundwater Monitoring Wells/Nested Soil Vapor Probes
20 Installation Report at 4–8 (Nov. 28, 2017). The groundwater monitoring wells were
21 first sampled on July 21, 2017. *Id.* On July 17, 2017, EAI and its contractors began
22 removal of the foundation slab and assessment of the soil beneath it and features of
23 concern identified therein. *See Ex. 5*, Supplemental Site Assessment II at 2 (October
24 18, 2018). As noted above, EAI submitted a report to DTSC on November 28, 2017,
25 entitled Groundwater Monitoring Wells/Nested Soil Vapor Probes MW-4/SVP-4,
26 MW-5/SVP-5 and MW-7 Installation Report, that reported on groundwater
27 contamination data gathered from the groundwater wells installed earlier in the year.
28

1 *See generally* Ex. 4, Groundwater Monitoring Wells/Nested Soil Vapor Probes
2 Installation Report at 1–11.

3 Excavation of the foundation slab revealed multiple previously unknown
4 features of concern, including underground vaults, drainage troughs, and staining
5 indicating the potential presence of heavy metals. Because the new features of
6 concern required substantial additional investigation and required removal of
7 hundreds of tons of contaminated and potentially contaminated soil from the
8 Property, the work associated with completing the workplan was not finished until
9 November 3, 2017. *See* Ex. 6, February 28, 2018 Letter from Brian Beltz to
10 Michael Haynes.

11 **b. Months-Long DTSC Approval Timeline for Groundwater
12 Monitoring Report, and Soil Sampling and Management Plan**

13 On February 22, 2018, EAI received a Notice to Comply from the South Coast
14 Air Quality Management District (“AQMD”) stemming from a complaint lodged by
15 counsel for Defendants Luppe Luppen, Paula Luppen, and Metal Products
16 Engineering, asserting that soil stockpiles generated during removal and
17 investigation of the foundation slab were being mismanaged, and contained or could
18 contain hazardous substances. *See* Ex. 7, February 15, 2019 Letter from Folashade
19 Simpson to Aliza Karney Guren. DTSC indicated that it was jointly investigating
20 the management of the stockpiles with AQMD. *See id.* at 1. The Notice to Comply
21 requested details concerning the creation and management of the stockpiles, to
22 which EAI responded on February 28, 2018 and provided a copy of its response to
23 DTSC. *Id.*; Ex. 6. DTSC did not provide comments on EAI’s response until May 29,
24 2018, requesting additional information; EAI responded on June 29, 2018 and
25 simultaneously submitted a workplan to further test and characterize soil within the
26 stockpiles. *See* Ex. 7 at 2. DTSC requested additional information again on
27 September 18, 2018, and met with EAI staff October 16, 2018 to discuss the
28 stockpile investigation workplan and the groundwater monitoring conducted to date.

1 *Id.* DTSC did not finally approve the workplan to complete sampling and
2 characterization of the stockpiles until December 10, 2018. *Id.* Sampling pursuant to
3 the workplan was conducted immediately thereafter on December 12 and 13, 2018,
4 with representatives from DTSC and AQMD present. *Id.* EAI submitted a report on
5 the results of that sampling on January 7, 2019, *see* Ex. 8 February 21, 2019 Letter
6 from Brian Beltz to Folashade Simpson and Michael Haynes, which DTSC approved
7 on February 15, 2019, finding that the stockpiles do not contain hazardous
8 substances. Ex. 7 at 3.

c. Months-Long DTSC Approval Timeline for Supplemental Site Assessment II, and Supplemental Site Assessment III Workplan

11 While DTSC and AQMD conducted their year-long investigation of the soil
12 stockpiles on the Property, EAI expeditiously sought to advance investigation of the
13 Property's subsurface. On October 18, 2018, following the October 16 meeting
14 described above, EAI submitted a comprehensive report to DTSC entitled
15 Supplemental Site Assessment II, discussing and interpreting the extensive work
16 conducted to characterize and remediate the features of concern identified during the
17 foundation slab removal, and the groundwater and soil vapor data gathered to date
18 on the Property. *See generally* Ex. 5, Supplemental Site Assessment II at 1–4, 76–
19 81. On October 19, 2018, EAI submitted a workplan to DTSC to conduct an
20 additional supplemental site assessment, titled Supplemental Site Assessment III
21 Workplan, proposing in relevant part the installation of two additional on-site
22 groundwater monitoring wells, and four off-site wells. *See* Ex. 9, Supplemental Site
23 Assessment III Workplan (October 19, 2018). DTSC responded on October 26,
24 2018, requesting that the workplan be expanded to conduct additional soil vapor
25 characterization work on the western portion of the Property. Ex. 10, October 26,
26 2018 Email and Attached Letter from Folashade Simpson to Steve Bright. EAI
27 provided an addendum to the workplan proposing additional soil vapor to comply

1 with that request on November 30, 2018. Ex. 11, November 30, 2018 Letter from
2 Steve Bright to Folashade Simpson.

3 DTSC did not provide comments on the Supplemental Site Assessment II, the
4 Supplemental Site Assessment III Workplan, and the work plan addendum until
5 February 12, 2019, Ex. 12, February 12, 2019 Email and Attached Letter from
6 Folashade Simpson to Steve Bright, and did not finally approve the three documents
7 until March 1, 2019. *See* Ex. 13, March 1, 2019 Email from Folashade Simpson to
8 Steve Bright. EAI commenced work under the workplan as soon as possible
9 thereafter, installing the new soil vapor probes and on-site groundwater monitoring
10 wells throughout the month of March. *See* Ex. 14, Compilation of March 2019
11 Emails from Steve Bright to Folashade Simpson.

12 **d. Months-Long DTSC Approval Timeline Anticipated for Feasibility
13 Study and Human Health Risk Assessment**

14 The next regulatory step Plaintiffs must take is the submission of the Human
15 HHRA and FS, as required by the VCA. *See* Ex. 15, Amendment to VCA at §§ 2,
16 3.2. The HHRA will specify the potential health risks posed by the intended future
17 uses of the Property based on the extensive data gathered, and the FS will present
18 the recommended cleanup strategy to eliminate and monitor contaminants detected
19 on the Property. EAI plans to submit the HHRA to DTSC on or about April 9, 2019,
20 and submit the HHRA in April 2019. Based on the timing of DTSC's responses to
21 submissions to date, Plaintiffs anticipate DTSC will not provide comments on and
22 approve the Human HHRA and FS earlier than July 2019, after both fact discovery
23 and expert discovery under the current scheduling order have closed.

24 **e. Concurrent Off-Site Subsurface Investigation**

25 Concurrent with the on-site testing described above, EAI is preparing to
26 conduct soil gas and groundwater sampling at four off-site locations east and
27 northeast of the Property, beneath Boyle Avenue and Leonis Boulevard. As noted
28 above, the Supplemental Site Assessment III Workplan proposed installing

1 groundwater monitoring wells and nested soil vapor probes, subject to approval of a
2 licensing agreement with the City of Vernon since the wells would be installed
3 beneath active city streets. *See* Ex. 9, Supplemental Site Assessment III Workplan
4 at 4. Installation of those wells is scheduled to occur during three of in April 2019
5 and one weekend in May 2019, with a first round of sampling to be completed by
6 the end of May. The location of those wells was selected based on the current
7 direction of groundwater flow, such that data gathered from those wells will likely
8 show the concentration of contaminants flowing toward the Property via regional
9 groundwater flow.

10 **IV. ARGUMENT**

11 **a. Legal Standard**

12 Pursuant to Federal Rule of Civil Procedure 16(b)(4), a scheduling order “may
13 be modified only for good cause and with the judge’s consent.” “Rule 16(b)’s ‘good
14 cause’ standard primarily considers the diligence of the party seeking the
15 amendment. The district court may modify the pretrial schedule ‘if it cannot
16 reasonably be met despite the diligence of the party seeking the extension.’” *Johnson*
17 *v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992) (citing Fed. R. Civ.
18 P. 16 advisory committee notes (1983 amendment)). Good cause may be found
19 where the moving party shows that “it is unable to comply with the scheduling
20 order’s deadlines due to matters not reasonably foreseeable at the time the
21 scheduling order issued, and that it was diligent in seeking a modification once it
22 became apparent it could not comply with the scheduling order.” *Sharp v. Covenant*
23 *Care LLC*, 288 F.R.D. 465, 467 (S.D. Cal. 2012). The existence or degree of
24 prejudice to the party opposing the modification may be considered, but it is
25 secondary to the moving party’s reasons for seeking modification. *Johnson*, 975
26 F.2d at 609; *see also Stoddart v. Express Servs.*, No. 212CV01054KJMCKD, 2017
27 WL 3333994, at *2 (E.D. Cal. Aug. 4, 2017) (granting motion to modify pre-trial
28 scheduling order where movant demonstrated good faith and diligence in discovery,

1 and opposing parties would not be prejudiced). Motions to modify scheduling orders
2 are more favored when “the need to amend arises from some unexpected or outside
3 source.” *Fed. Deposit Ins. Corp. As Receiver for Butte Cnty. Bank v. Ching*, No.
4 213CV01710KJMEFB, 2016 WL 1756913, at *2 (E.D. Cal. May 3, 2016).

5 **b. Plaintiffs Have Diligently Prosecuted This Case and Investigated
6 Their Property Under Agency Oversight Despite
7 Unforeseen Delays.**

8 At each stage of this litigation, Plaintiffs have worked expeditiously to
9 advance the investigation of its Property pursuant to its VCA with DTSC, but has
10 been unable to complete portions of the investigation that are critical to presenting
11 evidence of both liability and damages. In particular, Plaintiffs have been unable to
12 submit the HHRA and FSA due to additional investigation ordered by DTSC
13 concerning the soil stockpiles on-site that required nearly a year to complete, and
14 because DTSC has repeatedly taken months to comment on and approve reports
15 submitted by EAI.

16 At the time of the January 3, 2018 stipulation that scheduled trial for February
17 2019, EAI had completed removal of the foundation slab and analysis of the features
18 of concern discovered thereunder, and had installed groundwater monitoring wells
19 to monitor soil gas and groundwater contamination in the Property’s subsurface.
20 Plaintiffs anticipated at that time that investigation of the Property and the
21 accompanying regulatory processes would be completed by December 2018. Due to
22 the joint DTSC and AQMD investigation of the soil stockpiles that began in
23 February, 2018, however, EAI was required to provide substantial additional
24 information and conduct additional analysis, to demonstrate that the soil stockpiles
25 were non-hazardous and were being appropriately managed. As noted above, DTSC
26 took three months to respond to the information EAI provided regarding the
27 windrows in February 2018, and another three months to respond to supplemental
28 information EAI provided in May 2018.

1 Importantly, because the investigation of the stockpiles is part and parcel of
2 the same investigation EAI is conducting into the Property's subsurface, all of which
3 is subject to the VCA, Plaintiffs were substantially delayed in advancing the overall
4 investigation of the Property until the supplemental investigation of the stockpiles
5 was complete. Under the terms of the VCA, no work may be completed and
6 Plaintiffs and EAI may not move to a new stage of the investigation without DTSC
7 approval. *See Ex. 1, VCA at §15.* Because DTSC took more than three months to
8 comment on information provided by EAI concerning the stockpiles (between
9 February and May 2018), and an additional three months to comment again on EAI's
10 responses (between June and September 2018), EAI could not submit the
11 Supplemental Site Assessment II and Supplemental Site Assessment III Workplan
12 until mid-October, 2018, and could not submit the requested Supplemental Site
13 Assessment III Workplan Addendum until November 30, 2018. The substantial
14 additional work required concerning the soil stockpiles was not foreseeable at the
15 time of the January 2018 stipulation, nor were the prolonged response times from
16 DTSC for EAI's various submissions.

17 At the time of the December 24, 2018 stipulation continuing the pre-trial
18 deadlines and staying discovery, DTSC had been in possession of the Supplemental
19 Site Assessment II and Supplemental Site Assessment III Workplan for nearly two
20 months, and the Supplemental Site Assessment III Workplan Addendum for nearly
21 a month. Plaintiffs reasonably believed at that time that DTSC would timely respond
22 to and approve those documents, and that EAI would soon thereafter be able to
23 submit the required HHRA and FS, which could then be reviewed and approved
24 within the remaining time for fact discovery, i.e. before June, 2019. However, DTSC
25 did not approve those documents until March 1, 2019, and EAI has therefore been
26 unable to submit the HHRA and FS until April, despite diligently conducting all
27 work approved by DTSC to date. As such, it is unlikely that DTSC will review and
28 approve the HHRA and FS prior to July 2019, based on its timeline for responding

1 to reports and submissions to date. In sum, the nearly four months DTSC took to
2 approve the Supplemental Site Assessment II and Supplemental Site Assessment III
3 Workplan, and the resulting delays were not foreseeable at the time of the December
4 2018 stipulation.

5 **c. Submission and Approval of the Human Health Risk Assessment
6 and Feasibility Study are Critical to Presenting Plaintiffs' Liability
and Damages Case.**

7 Plaintiffs represented in the January 2018 stipulation their belief "that fact and
8 expert discovery in this action cannot reasonably be completed until after Plaintiffs'
9 Human Health Risk Assessment and Feasibility Study are completed, submitted, and
10 approved by DTSC." Doc. 131 at 3. That remains true. The HHRA will determine
11 the degree of risk the contamination presents to human health and the environment,
12 which is critical to Plaintiffs' presentation of their claims, in particular as to their
13 nuisance and trespass claims. That is, Plaintiffs' nuisance and trespass claims both
14 require a showing of the degree of interference to Plaintiffs' use and enjoyment of
15 the Property,³ and DTSC's approval of the HHRA will provide essential evidence
16 concerning the degree to which use of the Property has been impacted or limited by
17 subsurface contamination that Plaintiffs allege was caused by Defendants' conduct.
18 Absent this evidence, all parties' fact and expert discovery will be
19 severely hampered.

20 Similarly, DTSC's approval of the FS will be critical to determining the scope
21 of Plaintiffs' remediation costs that may be recoverable under their CERCLA claims.
22 That is, Plaintiffs may recover under CERCLA costs incurred in response to
23 contamination at the Property not inconsistent with the national contingency plan,

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³ See, e.g., *San Diego Gas & Elec. Co. v. Superior Court*, 13 Cal. 4th 893, 937
27 (1996) (private nuisance claim requires "proof of interference with the plaintiff's
use and enjoyment of [plaintiff's] property"); *Mangini v. Aerojet-Gen. Corp.*, 230
28 Cal. App. 3d 1125, 1141 (Cal. Ct. App. 1991) (trespass requires proof of "unlawful
interference with possession of property").

1 and may also be entitled to a declaratory judgment on liability for future costs for
2 such response. *See id.* at §§ 9607(a)(4)(B), 9613(2)(B). The FS, once approved, will
3 provide critical evidence concerning the costs Plaintiffs will incur in responding to
4 contamination at the Property, because it will determine the form and scope of
5 remediation Plaintiffs will be required to perform on the Property's soil, soil gas,
6 and potentially groundwater. Approval of the FS will cordon the reasonable range
7 of costs Plaintiffs will ultimately be required to expend, which will both critically
8 inform Plaintiffs' presentation of their case and provide important certainty to
9 settlement discussions. The VCA expressly provides that “[a]ll DTSC approvals and
10 decisions regarding submittals and notifications will be communicated to [Plaintiffs]
11 in writing,” and that “[n]o informal advice, guidance, suggestions or comments by
12 DTSC regarding reports, plans, specifications, schedules or any other writings by
13 [Plaintiffs] shall be construed to relieve [Plaintiffs] of the obligation to obtain such
14 written approvals.” Ex. 1, VCA at §15. Accordingly, Plaintiffs cannot reasonably
15 determine, or estimate with precision, the scope of their likely remediation costs until
16 the Feasibility Study is approved.

17 Additionally, the off-site groundwater sampling to be conducted beneath
18 Boyle Avenue and Leonis Boulevard will substantially inform the contribution to
19 contamination at the Property from off-site sources. That is, because those
20 groundwater monitoring wells are sampling from locations that are believed to be
21 upgradient in terms of regional groundwater flow, the differential between data
22 gathered from them and data gathered on the Property will show whether
23 contaminants are more highly concentrated upgradient (tending to indicate that
24 contaminants are flowing onto the Property), or more highly concentrated on the
25 Property (tending to indicate that contamination originated on-site). This data will
26 be important to determining the allocation of responsibility among any responsible
27 parties under Plaintiffs' CERCLA claims. *See* 42 U.S.C. § 9613(f)(1). As noted
28 above, data from those wells is unlikely to be gathered before late May, making such

1 data extremely difficult for the parties to incorporate into their expert analysis during
2 expert discovery in June 2019.

3 In sum, Plaintiffs and their consultant have worked as diligently and swiftly
4 as possible to investigate the contamination in the Property's subsurface, but have
5 been repeatedly and unreasonably delayed by additional investigatory requests from
6 DTSC, and repeated delays in DTSC's responding to Plaintiffs' and EAI's reports
7 and submissions. For these reasons, Plaintiffs will be unable to present critical
8 liability and damages evidence before the close of fact and expert discovery, until
9 the HHRA and FS are submitted, reviewed, and approved by DTSC. Likewise,
10 Plaintiffs will be unable to gather critical off-site evidence going to allocation of
11 responsibility among the parties before mid- to late-May, which will not provide
12 sufficient time for the parties to incorporate that data into their expert analyses. The
13 proposed modifications to the Court's Order re Jury Trial will provide the necessary
14 time to complete those regulatory steps, taking into account the potentiality that
15 DTSC will take longer than anticipated to respond the EAI's submission.

16 **V. CONCLUSION**

17 For the reasons stated herein, Plaintiffs respectfully request that the Court's
18 Order re Jury Trial be modified to continue the trial and pre-trial dates in this matter
19 according to the dates listed in the Proposed Order submitted herewith.

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21 Dated: April 2, 2019

SHER EDLING LLP

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By: /s/ Martin D. Quiñones

23

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